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SUBJECT: AMBASSADOR RICE MEETS WITH LIECHTENSTEIN PERMANENT
REPRESENTATIVE WENAWESER ON ICC ISSUES

¶1. (U) Summary: Amb. Rice met with Liechtenstein Amb. Wenaweser on July 7 on ICC issues. They discussed the USG review of the ICC, possible future USG engagement with the ICC, the 2010 review conference, the recent AU decision not to comply with the arrest warrant for President Bashir of Sudan, and the crime of aggression.

¶2. (U) Liechtenstein Amb. Wenaweser, President of the ICC Assembly of State Parties, met with Amb. Rice on July 7 to discuss the status of the USG review of the ICC and other ICC-related issues. Wenaweser said he wanted to explore what USG engagement could be within the ICC Assembly of State Parties and in other fora. He indicated he was aware of the ongoing U.S. policy review and noted that the USG would soon receive an invitation to participate as an observer in next June's Review Conference in Kampala, where the main issue would be the crime of aggression. Wenaweser explained that the negotiators of the ICC had agreed aggression should be covered by the Rome Statute, but left the definition and conditions for exercise of jurisdiction to be negotiated later. He believed that the ICC Parties had worked out a "pretty solid" definition of aggression; what remains is how to bridge the gap on the conditions for exercise of jurisdiction where one group (the P-4) want to require a prior determination of aggression by the U.N. Security Council, while most other countries do not want to leave the exercise of jurisdiction entirely up to the Council. He noted there is a subsidiary issue for the Review Conference: whether to keep Article 124, which gives States Parties the ability to opt out from war crimes jurisdiction for seven years.

¶3. (SBU) Amb. Rice asked what Wenaweser thought the effect of the AU decision not to enforce the arrest warrant for President Bashir would be on the ICC and, more specifically, on the Review Conference. Wenaweser said he wasn't sure, because the decision does not have any legal effect-ICC Parties still have a treaty obligation to execute the warrant. He noted that Botswana had already dissociated itself and said it would abide by the warrant; he hoped other countries such as Uganda would as well.

¶4. (SBU) Asked by Amb. Rice what he thought the impact and benefit would be if the USG engaged as an observer at the ICC, Wenaweser said he thought that the USG would be better informed about what the ICC was doing, that there were some areas where the ICC was of interest to the USG "as a tool" and that it would be useful for the USG to engage on the definition of aggression, about which "your people have always had qualms." He expressed the hope that the USG review process would not be drawn out with the U.S. position crystallizing only at the last minute before the Review Conference, as that would not be productive. While he hoped the USG would not come forward with "fifteen pages of amendments" to the Rome Statute, it would be better to come forward with problems sooner rather than later, and to let him know what was coming.

15. (SBU) Pressed to say how he would like the USG review to come out, Wenaweser said he was a realist. He would envision a policy of small incremental steps toward increased USG engagement with the court, with USG involvement in certain areas, for example, arrests (perhaps through intelligence sharing), with USG ratification coming in the distant future, if at all. He thought it was important to have more States Parties, but also positive and constructive engagement from States that are not yet parties. He characterized the position of Russia and China as "not negative, as it could be," and highlighted the fact that they allowed resolution 1593 to be adopted. He characterized China's posture as one of "benign neglect." They are a bit irritated over Darfur and far from joining, but always attend the Assembly of States Parties and are active as observers, including on the issue of aggression. The Russians are also active on aggression.

16. (U) Wenaweser noted there were a lot of misconceptions in the United States Congress, but also far more widespread, about what the ICC is and does. An educational effort is needed to explain concepts such as complementarity (the ICC acts only when national courts won't or can't) and to make clear that the Rome Statute is not retroactive. Amb. Rice suggested that the ICC consider issuing fact sheets that explained the ICC and the principal issues clearly.

17. (SBU) Amb. Rice turned the conversation to the crime of aggression, noting that the definition of aggression undoubtedly raises anxiety in places like Washington, D.C., in part because people do not understand how there can be an individual crime of aggression, let alone what it is.

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Wenaweser responded that criminalizing aggressive war had been on the agenda since World War II, after which a number of defendants were convicted of aggression at Nuremberg, but that had been aggression involving war; there was no current legal basis for penalizing individuals for illegal use of force. He asserted that the working definition is very conservative and narrow, and would not apply to many cases, as there must be aggression by a State before an individual can be held criminally responsible. Amb. Rice said that some would question the limitation to actions by States, when non-State actors such as rebel groups and terrorists are responsible for so many illegal uses of force. She also questioned how the boundary between self-defense and aggression would be defined, and suggested that having anyone other than the Security Council define that boundary might be seen as impinging on its role. Wenaweser said there was general agreement that the Council should have the first shot. The harder issue was what to do if the Security Council doesn't act; outside of the P-5, most countries were not content to let the Security Council have the final say. This was the most difficult issue facing the Review Conference.

18. (U) Amb. Rice thanked Wenaweser for his perspective. She told him that USUN would keep in touch with him during the review, and encouraged him to speak with others in Washington, D.C.
RICE